



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: RICHARD DOYLE
City Attorney

SUBJECT: Employee Benefits – Same Sex
Marriage – Domestic Partners

DATE: March 5, 2004

BACKGROUND

On March 9, 2004, the City Council will discuss City employment benefits and certification of same sex marriages by other jurisdictions. The City's employee benefit plans provide benefits for domestic partners but do not address same sex marriages. The City's Retirement Plans do not provide survivor or medical benefits to domestic partners or to spouses of same sex marriages.

This memorandum will address issues relating to City employee benefits, including retirement benefits, for spouses of same sex marriages and domestic partners.

DISCUSSION

I. Health and Dental Insurance Plans

A. Same Sex Marriage

Under current City policies, health, dental and other insurance plans offer insurance coverage to employees, their spouses and their eligible dependents. Additionally, domestic partners as defined by the City are also provided coverage. The question as to whether "same sex marriages" certified in local jurisdictions are legally valid under state law is before the California Supreme Court because of a petition filed by state Attorney General seeking an order ending San Francisco's issuance of marriage licenses.

However, the City of San Jose may as a matter of policy recognize "same sex marriage" certificates issued to City employees by other jurisdictions for purposes of providing employee benefits under City policies and procedures. There are federal tax consequences for City employees who wish to cover their spouses of same sex marriages.

B. Domestic Partners – Current City Policy

City of San Jose benefits plans, including health and dental, generally provide benefits for domestic partners. Domestic partners are currently eligible for enrollment only during open enrollment periods or within the first 30 days of an employee's date of hire or benefits eligibility. Dependents of an employee's domestic partner are not eligible for coverage. Under the City's benefit plans, only the natural and adopted children of the City employee are eligible family members for health, dental and other benefit coverage as dependents.

C. Employee Health Insurance Plans

The City's Kaiser Health Plan does not define the term "spouse" other than to provide that the term "spouse" includes an employee's domestic partner. The Blue Shield Health Plans define "dependent" as an employee/subscriber's "legally married spouse." The Blue Shield definition of "dependent" also includes an employee's domestic partner.

According to the Employee Services Department, the City's employee benefit plans such as Kaiser and Blue Shield may not recognize same sex marriages for purposes of health insurance coverage. However, Kaiser, Blue Shield, Delta Dental, Dental Providers and the vision plans have indicated they will allow the signing of a Domestic Partner Affidavit as a qualifying event for a mid-year election and will extend benefit coverage to the children of domestic partners.

D. Tax Issues

1. Exclusions from Gross Income for Spouses and Dependents

There are tax differences between health care benefits for spouses and domestic partners. Currently, when the City provides health care benefits for a spouse and/or dependents of an employee, the Internal Revenue Code allows the money paid by the City as the employer for the benefits to be excluded from the employee's gross income. (Internal Revenue Code §§ 105, 106). There is no exclusion for benefits provided to an employee's domestic partner and/or the dependents of a domestic partner. Therefore, the money paid by the City for health benefits for an employee's domestic partner or dependents of a domestic partner is taxable income to the employee unless the domestic partner is a "dependent" under specified Internal Revenue Service (IRS) criteria. (Internal Revenue Code § 152(a)).

2. Federal Law – Marriage - Spouse

Federal regulations now allow for election changes other than at open enrollment if a recognized change in status occurs. For example, such a change in status includes a change in "legal marital status." (26 CFR 1.125-4T). This permitted election would not

generally change the exclusion from gross income. However, the federal "Defense of Marriage Act" defines "marriage" as meaning "only a legal union between one man and one woman as husband and wife," and the word "spouse" refers only to a "person of the opposite sex who is a husband or a wife." (Public Law 104-199). The federal Act provides that this definition applies to any ruling, regulation or interpretation of the various administrative bureaus and agencies of the United States.

Therefore, tax treatment of spouses of same sex marriages under federal tax rules would be similar to that of domestic partners. In other words, the money paid by the City for health benefits for a "spouse" of a same sex marriage will be treated as taxable income to the employee unless the spouse is determined to be a "dependent" under IRS rules. These same rules apply to domestic partners under the City's current policy.

E. Other Benefits and Leaves

Same sex spouses of City employees may be eligible for workers compensation death benefits if they qualify as dependents of the employee. (See, Labor Code §§ 4701, 4703). City employees are currently eligible to use sick leave for illnesses of a spouse or domestic partner and may use bereavement leave for the death of a spouse or domestic partner.

II. Retirement Plans

The City of San Jose Federated Retirement Plan and the Police and Fire Retirement Plan do not currently provide survivor or health benefits for domestic partners or for a member's or retiree's spouse of a same sex marriage.

A. Retirement Plans – Spouse

Both City retirement plans provide survivorship benefits for the surviving spouse of an employee or retiree and provide medical benefits for spouses meeting the eligibility criteria. The term "spouse" is defined in the Federated Retirement Plan as a "wife or husband." (San Jose Municipal Code § 3.28.1460). The term "spouse" in the Police and Fire Retirement Plan is defined as a "person." (San Jose Municipal Code § 3.36.1200). In both plans, the survivor must have been married to the member at the time of the member's death (and, in the case of a retiree, at the time of retirement). If survivor or medical benefits are approved for spouses in same sex marriages and domestic partners for either Plan, Code amendments will be needed to clarify and implement the Plan changes.

B. Retirement Boards – Process

Employee benefit changes and amendments to City Retirement Plans are generally implemented after an actuarial study and review by the respective Retirement Boards. Additionally, such changes may be subject to the meet and confer requirements of the Meyers-Milius-Brown Act. (Gov. Code § 3500 et seq.).

CONCLUSION

The City of San Jose may recognize “same sex marriage” certificates issued to City employees by other jurisdictions such as the City and County of San Francisco for purposes of providing employee benefits under City policies and procedures. Implementation of benefits in the retirement plans will require amendments to the plans. Income tax treatment of spouses of same sex marriages under current federal tax rules would be similar to that of domestic partners.

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